

evidence would be if an issue was relitigated," or "whether the result would be different if an issue was relitigated," are simply not elements of collateral estoppel. It would be error to conclude a ruling on collateral estoppel must await the outcome of yet another evidentiary hearing. Such a course of action would itself defeat the very purpose of collateral estoppel, which is to relieve a party who has already once shouldered and met an evidentiary burden from having to shoulder that same burden again:

We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. ... Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, which acts in a judicial capacity.

Astoria Federal Savings & Loan Assn v. Solimino, 501 U.S. 104, 107-08 (1991).

At the Tank seam hearing, when the burden of proof was on Co-op, not Water Users, the Board found Co-op had met its burden on numerous issues, including findings that Big Bear Spring is not hydrologically connected to Co-op's permit area, that Birch Spring also is not hydrologically connected to Co-op's permit area, and that Co-op's permit application satisfied all statutory and regulatory requirements. As the U.S. Supreme Court stated in Astoria, *supra*, Water Users "deserve no rematch after a defeat fairly suffered" as to those issues, and the Board may not again impose the same burden on Co-op, who has already met its burden as to those issues.

In Copper State Thrift & Loan v. Bruno, 735 P.2d 387 (Utah App. 1987), the court made clear that the "fairly litigated" element of collateral estoppel stems from the requirements of due process, and is met if due process is satisfied:

The final element of collateral estoppel requires that the issue was competently, fully, and fairly litigated in the first forum. This element stems from fundamental due process and requires that litigants have their day in court. For purposes of due process, the parties must receive notice reasonably calculated, under

all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted]

Copper State contends that the fundamental requirements of due process were not met in this case. Copper State claims it was given inadequate notice of the bankruptcy reorganization hearing and had inadequate incentive to litigate the claim.

Contrary to Copper State's contentions, however, the record demonstrates Copper State was given adequate notice and had an opportunity to fully and fairly litigate the issue ...

Copper State full participated in the confirmation hearing and had an opportunity to present witnesses on its behalf. Copper State cross-examined the debtor extensively ... The notice which Copper State received was sufficient to apprise Copper State of the action and afforded Copper State an opportunity to present its objections and arguments, which it in fact did.

... Thus, the final element of collateral estoppel, that the issue be fully and fairly litigated, is satisfied.

Copper State, 735 P.2d at 391. As did Copper State, Water Users had notice and an opportunity to be heard on all issues resolved during the Tank seam hearing. In fact, it was Water Users themselves who first raised and insisted on trying the very issues they now wish to relitigate. Water Users full participated in the Tank seam hearing, presented witnesses and cross-examined Co-op's witnesses on those very issues: "At the hearing the Board received evidence from Water Users supporting their theory of an interconnected water system joining the permit area and the springs, and from Co-op and the Division supporting the contrary theory that the springs and the permit area are in separate water systems. The Board found that there was no connection..." Castle Valley Special Service District et al. v. Utah Board of Oil, Gas & Mining, 938 P.2d 248, 253 (Utah 1996).

The Utah Supreme Court has already expressly held Water Uses had due process, and the very issues Water Users now want to relitigate were already competently, fully and fairly litigated during the Tank seam hearing:

[Water Users claim] they were not given ... an adequate hearing on Blind Canyon seam issues and therefore were deprived of due process by the issuance of findings on those issues.

The record does not support this claim. ... In the course of the hearing, Water Users adduced evidence in support of the arguments that (1) water traveling through faults and cracks would come from above the Tank seam, pick up contaminants in the Tank seam, and proceed down through the Blind Canyon seam and into the springs; (2) water pumped up from the Blind Canyon seam for use in Tank seam mining would either be taken out of the mine with coal or carry

contaminants with it back down to the Blind Canyon seam; (3) the permit revision application and the Division's evaluation of the application failed to satisfy statutory and regulatory requirements because they did not recognize and address damage already caused to the springs by mining

... [T]he validity of these objections to the permit revision depends on conclusions about the nature of the Blind Canyon seam - what relationship there is between the Tank and the Blind Canyon seams and whether a hydrologic link exists between the Blind Canyon seam and the springs. Far from being caught by surprise by the Board's consideration of Blind Canyon seam issues and evidence in deciding whether to approve Tank seam operations, Water Users actively supported the use of such evidence during the hearing and in their post-hearing memoranda. Furthermore, Water Users have adopted an argument before this Court which makes Blind Canyon seam conditions relevant: In support of their request for replacement water, Water Users renew to this Court the claim that pumping water from the Blind Canyon seam to the Tank seam for mining purposes will adversely affect the springs. Since that result follows only if water in the Blind Canyon seam eventually makes its way to the springs, that assertion alone would make the hydrology of the Blind Canyon seam and its relationship to the springs relevant.

Castle Valley, 938 P.2d at 254-55 (Utah 1996).¹ It has thus already been conclusively resolved through the appellate process that Water Users had notice and an opportunity to be heard, and competently, fully and fairly participated in litigating the very issues they now wish to relitigate.

Water Users also cite Stumph v. Church, 740 P.2d 820 (Utah App. 1987) and Cox Corp. v. Dugger, 583 P.2d 96 (Utah 1978) for the proposition that for collateral estoppel to apply, the issue in question must have been essential to the resolution of the previous action. In support of their argument that principle applies here, Water Users rely on the Board's statement that the Board "does not believe that it is relevant to consider the hydrologic impacts of existing mining in the permit area." Water Users argue from this statement that it was not only unnecessary, but was beyond the Board's jurisdiction, to make findings on those issues. However, the Utah Supreme Court already considered and rejected that very argument on appeal, expressly holding "The

¹ Present counsel for DOGM, who did not participate in the Tank seam hearing, apparently assumes Water Users were somehow limited in their presentation of evidence. Such an assumption would be mistaken. Despite objections by Co-op and the Division, Water Users were never limited in the presentation of any evidence, and none of Water Users' proffered evidence was ever excluded. Even at this late date, Water Users have never made any showing or argument whatsoever as to any evidence they may have possessed but chose for whatever reason not to offer at the Tank seam hearing. [Tank seam record generally; Castle Valley, 938 P.2d at 253.]

jurisdictional argument is without merit." Castle Valley, 935 P.2d at 253. The Court went on to find those issues were indeed relevant, and perhaps central to Water Users' claims:

In support of their request for replacement water, Water Users renew to this Court the claim that pumping water from the Blind Canyon seam to the Tank seam for mining purposes will adversely affect the springs. Since that result follows only if water in the Blind Canyon seam eventually makes its way to the springs, that assertion alone would make the hydrology of the Blind Canyon seam and its relationship to the springs relevant.

Castle Valley, 938 P.2d at 255. The Court concluded that Water Users' theory of the case made the relationship of the hydrology of the permit area and springs highly relevant, and that it was proper for the Board to resolve Water Users' claim by finding no hydrologic connection between the springs and the permit area.

The "essential for resolution" requirement comes from the Restatement (Second) of Judgments, §27, which states, "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Comment *o* to the Restatement clarifies the effect of an appeal on the collateral estoppel effect of findings on two independent issues:

If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations.

In this case, the Utah Supreme Court on appeal upheld as sufficient the Board's findings that the springs are not hydrologically connected to Co-op's permit area, that Co-op's mining operation was designed to prevent material damage to the hydrologic balance outside the permit area, and that Co-op's permit complied with all statutes and regulatory requirements. Having been reviewed and affirmed on appeal, those findings are "essential to the judgment" and are subject to collateral estoppel.

The only remaining question raised by the supplemental memoranda is what issues raised by Water Users' present objection are identical to issues resolved by the Tank seam hearing and its appeal. The first such issue resolves the relationship between the hydrology of the springs and Co-op's permit area. In the Tank seam hearing, the Board resolved that issue by finding there is no hydrologic connection between either spring and Co-op's permit area.

It is that very issue that forms the heart of Water Users' objections. Water Users do not suggest there is new evidence of some cataclysmic geologic upheaval altering the hydrology in the last two years. If there was such a change, that might be a new issue to which collateral estoppel would not apply. But the area's hydrology has not changed. It is now as it was then. Water Users simply want to relitigate whether the Board erred in its earlier resolution of those issues in the Tank seam hearing. However, "It is a fundamental principle of res judicata that for a judgment to be valid, it need not be free from error." Copper State, 735 P.2d at 392. To hold Water Users may relitigate that issue would "impose unjustifiably upon Co-op, who has already shouldered its burdens, and drain the resources of an adjudicatory system with disputes resisting resolution." Astoria, *supra*. That is the very result collateral estoppel is intended to prevent.

Co-op has identified at least three other issues to which collateral estoppel applies:

- As of the date of the Tank seam Order, neither the quantity nor the quality of water at either spring had been adversely impacted by mining at the Bear Canyon mine.
- As of the date of the Tank seam Order, Co-op's mining operation was designed to prevent material damage to the hydrologic balance outside the permit area.
- As of the date of the Tank seam Order, Co-op's permit application was complete and accurate, and in full compliance with all statutory and regulatory requirements.

Whether the springs have been impacted since the Tank seam hearing may be a new issue to which collateral estoppel would not apply. However, even as to that issue the Board must begin by taking as already established that there is no hydrologic connection between the springs and the permit area. Collateral estoppel requires that Water Users prove this issue, if at all, on some evidentiary basis other than a hydrologic connection between the springs and the permit area..

As to the second issue, it is also theoretically possible that Co-op could change the design of its mining operation after the Tank seam hearing. If Co-op had made any such change in its operation, the issue whether such a change was designed to prevent material damage to the hydrologic balance outside the permit area could be a new issue to which collateral estoppel would not apply. However, Co-op has not changed its methods of operation in any way that would affect the hydrologic balance outside the permit area, and Water Users have not alleged that Co-op has made any such changes.

Finally, it is theoretically possible that changes could be made to the controlling statutes since the Tank seam hearing, or that Co-op could somehow change the contents of its permit, which was already proven to be complete, accurate and in compliance with law at the time of the Tank seam hearing. If there were such changes, a new issue could arise whether the changes would require Co-op to further modify its permit. But there have been no such changes and Water Users have alleged no such changes. Further, Water Users could challenge Co-op's permit renewal based on such changes only by alleging and proving they would be adversely impacted by the changes, which, if premised on a hydrologic connection between springs and Co-op's permit area, would be an issue that is itself barred by collateral estoppel.

CONCLUSION

For the reasons stated above, the Board should apply collateral estoppel to bar relitigation of all issues previously resolved by the Board in the Tank seam hearing

DATED this 24 day of November, 1997.


Attorney for Co-op Mining Company

CERTIFICATE OF SERVICE

I certify on November 24, 1997 I served the above document by first class mail to:

J. Craig Smith
David B. Hartvigsen
NIELSEN & SENIOR
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111
Attorneys for
North Emery Water Users' Association and
Huntington-Cleveland Irrigation Company

Jeffrey W. Appel
Benjamin T. Wilson
COLLARD, APPEL & WARLAUMONT
9 Exchange Place, Suite 1100
Salt Lake City, Utah 84111
Attorneys for
Castle Valley Special Service District

Daniel G. Moquin
Assistant Attorney General
1594 West North Temple, Suite 300
P.O. Box 140855
Salt Lake City, Utah 84114-0855
Attorney for
Utah Division of Oil, Gas & Mining

A handwritten signature in cursive script, reading "Mark Hansen", written over a horizontal line.

2006P.010